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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 PETER STROJNIK, an individual)
10)
11 Plaintiff,) NO. CV-08-1276 PHX SRB)
12 vs.)) **DECLARATION OF PETER STROJNIK**
13)) **UNDER THE PENALTY OF PERJURY**
14 THE COSTAR REALTY)
15 INFORMATION, Inc., a Corporation;)
COSTAR GROUP, Inc., a Corporation)
16)
Defendants.)
17)
18)

19 I, Peter Strojnik, make the following declaration under the penalty of perjury to the best of his
20 knowledge, information, and belief:

21 1) My name is Peter Strojnik. I am an attorney licensed to and practicing in State and Federal
22 Courts of the State of Arizona and in the 9th Circuit Court of Appeals.
23 2) I was admitted to the State Bar of the State of Arizona in or about 1980. My state bar
24 number is 006464.
25 3) One of my major areas of interest in the practice of law at the present time is the prevention
of spammers who violate A.R.S. § 44-1372, junk faxers who violate the Telephone

1 Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005, 47 U.S.C. §
2 227 *et seq.* and particularly those junk faxers who promote publicly traded stock in violation
3 of Rule 10b-5.

4

5 4) I am counsel of record for the Consumer Protection Corporation whose primary function is
6 the prevention of spam, junk fax broadcasts and 10b-5 fraud of small cap publicly traded
7 companies. I provide many services to the Consumer Protection Corporation free of charge,
8 or *pro bono*.

9 5) Consumer Protection Corporation is owned by Tanya C. Strojnik, Declarant's wife. CPS's
10 primary purpose is to prevent victimization of innocent victims by spammers, junk fax
11 broadcasters and Rule 10b-5 violators (to whom Mrs. Strojnik herself lost several hundreds
12 of thousands of dollars).

13 6) Prior to initiating suit in any matter, including the above captioned matter, I conduct
14 significant research into the merits of the claims to be asserted.

15 7) I have no personal animosity of the Defendants in this action. Prior to being bombarded
16 with their spam e-mails, I did not know who Defendants are.

17 8) With respect to the ACEMA actions – including the above captioned action - I conducted
18 significant review of law, facts and other relevant information, including the following:
19
20 a) A.R.S. § 44-1372 and relevant case law.
21
22 b) A.R.S. § 44-1372.01 and relevant case law.
23
24 c) A.R.S. § 44-1522, the consumer fraud statute, and the relevant case law relating to the
25 private cause of action. The Consumer Fraud Act provides an injured consumer with an
implied private cause of action against a violator of the act. *Sellinger v. Freeway Mobile*

1 *Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974). The elements of a private cause
2 of action under the act are a false promise or misrepresentation made in connection with
3 the sale or advertisement of merchandise and the hearer's consequent and proximate
4 injury. *Parks v. Macro-Dynamics*, 121 Ariz. 517, 591 P.2d 1005 (App.1979).

5

- 6 d) The "reason to know"¹, standard employed in the ACEMA statutes.
- 7 e) A.R.S. § 44-1372.02 and relevant case law.
- 8 f) A.R.S. § 44-1372.03 and relevant case law.

9

10 ¹ The expression "having reason to know" is commonly used in this jurisdiction and others as a mens rea
11 for criminal liability. *State v. Lefevre*, 193 Ariz. 385, 972 P.2d 1021 (App.1998)

12 *Old Adobe Office Props., Ltd. v. Gin*, 151 Ariz. 248, 253, 727 P.2d 26, 31 (App. 1986) (stating whether
13 a party knew or had reason to know that a lien claim was invalid was a disputed issue to be determined
 by the trier of fact). Accord, *Pence v. Glacy*, 207 Ariz. 426, 87 P.3d 839, (App.2004)

14 In *Hill-Shafer Partnership v. Chilson Family Trust*, 162 Ariz. 485, 491-92, 784 P.2d 691, 697-98
15 (App.1989) the Court quoted from the Restatement relative to the meaning of the term "reason to
 know".

16 The concept of "reason to know" is defined in the Restatement:

17 A person has reason to know a fact, present or future, if he has information from
18 which a person of ordinary intelligence would infer that the fact in question does
19 or will exist. A person of superior intelligence has reason to know a fact if he has
 information from which a person of his intelligence would draw the inference.
20 **There is also reason to know if the inference would be that there is such a
 substantial chance of the existence of the fact that, if exercising reasonable
 care with reference to the matter in question, the person would predicate his
 action upon the assumption of its possible existence.**

22 Reason to know is to be distinguished from knowledge and from "should know."
23 Knowledge means conscious belief in the truth of a fact; reason to know need not
24 be conscious. "Should know" imports a duty to others to ascertain facts; the words
 " reason to know " are used both where the actor has a duty to another and where
 he would not be acting adequately in the protection of his own interests were he
 not acting with reference to the facts which he has reason to know.

1 g) A.R.S. § 1372.04 and relevant case law.
2 h) A.R.S. § 1372.05 and relevant case law.
3 i) 15 U.S.C. § 7707(B)² and relevant case law.

4 9) After review of all relevant statutes and case law relating to the statutes, I concluded that:

5 a) Federal Pre-Emption is Limited to State Law “Expressly Regulat[ing] the Use of
6 Electronic Mail” That Does Not Also Regulate “Falsity” or “Deception” for the
7 following reasons:

8 i) By the express wording of the statute, federal pre-emption applies *only* to state law
9 that “expressly regulates the use of electronic mail to send commercial messages” 15

10 Restatement (Second) of Contracts, § 19, Comment b.

11 ² 15 U.S.C. § 7707(b) provides, in its entirety:

12 (b) State law

13 (1) In general

14 This chapter supersedes any statute, regulation, or rule of a State or political
15 subdivision of a State that expressly regulates the use of electronic mail to send
16 commercial messages, except to the extent that any such statute, regulation, or
17 rule prohibits falsity or deception in any portion of a commercial electronic mail
18 message or information attached thereto.

19 (2) State law not specific to electronic mail

20 This chapter shall not be construed to preempt the applicability of—

21 (A) State laws that are not specific to electronic mail, including State trespass,
22 contract, or tort law; or
23 (B) other State laws to the extent that those laws relate to acts of fraud or
24 computer crime.

1 U.S.C. § 7707(b) (1) but only to the extent that such regulation does not “prohibit
2 [the] falsity or deception in any portion of a commercial electronic mail message”.

3 *Id.*

4 ii) In passing 15 U.S.C. § 7707(b), Congress did not purport to define “falsity” or
5 “deception”. It is ancient learning that it is within the province of a state to define
6 malfeasance and fix the remedies therefore. *Cox v. Maxwell*, 366 F.2d 765 (6th Cir.
7 1966). “[T]he historic police powers of the States [are] not to be superseded by
8 [federal legislation] unless that was the clear and manifest purpose of Congress.”
9 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator*
10 Corp., 331 U.S. 218, 230 (1947)). This presumption applies whenever “Congress has
11 legislated . . . in a field which the States have traditionally occupied.” *Id.* (quoting
12 *Rice*, 331 U.S. at 230). Traditionally, the power to define offenses is one of those
13 historic police powers referenced by the Supreme Court in *Medtronic*. 15 U.S.C.
14 does not purport to pre-empt the State’s right to define the terms “falsity” or
15 “deception”.

16 iii) In the matter at hand, the Arizona Legislature chose to define the omission of the
17 characters “ADV:” in the subject line of the e-mail as a deceptive act. A.R.S. §§ 44-
18 1372 and 44-1522, read together, do no more than “prohibit [the] falsity or deception
19 in any portion of a commercial electronic mail message or information attached
20 thereto”. 15-7707(b)(1) And to make absolutely sure that the Arizona Statute does
21 not offend the federal supremacy clause, the legislature saw it fit to specifically
22 legislate that the omission of the characters “ADV:” is a deceptive practice in

1 violation of 44-1522. See A.R.S. § 44-1372.01(C) (Failure to comply with this article
2 is an unlawful practice pursuant to section 44-1522) A.R.S. § 44-1522 provides:

3 The act, use, or employment by any person of any deception, deceptive
4 act or practice, fraud, false pretense, false promise, misrepresentation, or
5 concealment, suppression or omission of any material fact with intent
6 that others rely upon such concealment, suppression or omission, in
7 connection with the sale or advertisement of any merchandise whether
thereby, is declared to be an unlawful practice.

8 iv) A.R.S. § 44-1522 does not “expressly regulate the use of electronic mail to send
9 commercial messages”.

10 v) 15 U.S.C. § 7707(b)(1) pre-emption does not apply for two reasons:

11 (1) First, A.R.S. §44-1522 does not “expressly regulates the use of electronic mail”;

12 and

13 (2) Second, A.R.S. §§ 44-1372 and 44-1522, read together “prohibit falsity or
14 deception in any portion of a commercial electronic mail message”.

15 vi) As legislative acts, A.R.S. §§44-1522 and 44-1372 are presumed to be valid. *City of*
16 *Phoenix v. Fehlner*, 90 Ariz. 13, 18, 363 P.2d 607, 610 (1961). The party challenging
17 the legislative act has the burden of proving the unconstitutionality of the act. *Id.* at
18 18, 363 P.2d at 610. Defendants have proffered no such proof.

19 b) State Law Prohibits Defendant From Trespassing On Plaintiff’s Computer With Its
20 Electronic Messages, for the following reasons:

21 i) As if inviting claims of “trespass” against spammers, the Congress saw it fit to
22 permit state claims based on “trespass”. 16 U.S.C. § 7707(b)(2)(A)

- ii) Despite being a well-aged cause of action, trespass to chattels³ has been applied in the context of the internet. Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action in *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1567 (1996). In *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997), the court held that a spammer could be held liable to an internet service provider for sending unsolicited emails to the provider's clients. The court found that "[e]lectronic signals generated and sent by computer" were "sufficiently physically tangible to support a trespass cause of action." (emphasis supplied) Id. at 1021. In recent years, trespass to personal property, which had been largely relegated to a historical note in legal textbooks, has reemerged as a cause of action in Internet advertising and e-mail cases. A series of federal district court decisions, beginning with *CompuServe, Inc.*, has approved the use of trespass to personal property as a theory of liability for "spam e-mails". See *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998); *Hotmail Corp. v. Van Money Pie Inc.*, 1998 WL 388389 (N.D.Cal. Apr. 16, 1998); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D.Va. 1998); *America Online, Inc. v. Prime Data Systems, Inc.*, 1998 WL 34016692 (E.D.Va. Nov. 20, 1998).

³ Dubbed by Professor Prosser the "little brother of conversion," the tort of trespass to chattels allows recovery for interferences with possession of personal property "not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered." (Prosser & Keeton, *Torts* (5th ed. 1984) § 14, pp. 85-86.) Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable (see *id.*, par. (a) & com. d, pp. 420-421).

iii) Trespass to chattel is a recognized cause of action in Arizona. See, e.g. *Koepnick v. Roebuck*, 158 Ariz. 322, 762 P.2d 609, (App.1988). Trespass to chattel in the context of electronic invasion of another's computer system is also recognized. See *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712 (App. 2007)⁴. It is established law that even if (spam e-mail) occupies a small portion of the Plaintiff's computer memory, liability lies. *eBay, Inc. v. Bidder's Edge, Inc.* 100 F.Supp. 2d 1058, 1071 (N.D.Cal. 2000) ("Even if, as [defendant] argues, its searches use only a small amount of eBay's computer system capacity, [defendant] has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes. The law recognizes no such right to use another's personal property."

iv) In the matter at hand, Defendants - without authority or invitation – invaded Plaintiff's private computer and squatted in its memory. There is little difference between Peter Piper Pizza two-for-one ad being pasted on the front door of Plaintiff's home and Defendants pasting the offensive e-mail onto the computer screen. Both constitute “trespass”.

⁴ *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) ("A plaintiff can sustain an action for trespass to chattels, as opposed to an action for conversion, without showing a substantial interference with its right to possession of that chattel."). While the Court in *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 11/17/2006), based on the law of Oklahoma, found that no trespass to chattel cause of action could be maintained for sending unsolicited e-mail, Arizona Court of Appeals did not follow that reasoning *see Mobilisa, supra*. Using someone else's computer equipment is trespass. *McLeodUSA Telecommunications Services, Inc. v. Qwest Corp.*, 469 F. Supp.2d 677 (N.D.Iowa 01/16/2007) Restatement (Second) of Torts §217 (trespass to chattel occurs through either through "dispossession" of chattel or intermeddling with chattel "in the possession of another"). *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (finding

1 c) State Law Prohibits Defendants From Intruding upon Plaintiff's Seclusion By
2 Bombarding Plaintiff With Unwanted Messages, for the following reasons:

3 i) Arizona recognizes the four branches of the tort of invasion of privacy outlined in the
4 Restatement: 1) intrusion on seclusion; 2) commercial appropriation; 3) publication
5 of private facts; and 4) false light. Rest. (Second) of Torts § 652A (1977); *Godbehere*
6 *v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781, 784 (Ariz. 1989) (citing
7 Rest. § 652A-I); *Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 947 P.2d 846, 853 (App.
8 1997). The Restatement describes the tort of intrusion upon seclusion as follows:
9 "One who intentionally intrudes, physically or otherwise, upon the solitude or
10 seclusion of another or his private affairs or concerns, is subject to liability to the
11 other for invasion of privacy, if the intrusion would be highly offensive to a
12 reasonable person." *Hart*, 947 P.2d at 853 (quoting Rest. § 652B) A defendant is
13 liable "when he has intruded into a private place, or has otherwise invaded a private
14 seclusion that the plaintiff has thrown about his person or affairs." *Id.* (citing
15 Restatement § 652B cmt. c).

16 ii) The constant bombardment by unsolicited e-mails – sometimes tens, sometimes
17 hundreds - into Plaintiff's private e-mail box has become such an offensive
18 misconduct that both the United States Congress and the Arizona Legislature have
19 attempted to thwart it by legislation. *See, e.g.*, the CAN-SPAM act; ACEMA. Yet,

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25 trespass to chattels for interference with plaintiff's computer systems rather than its website or domain
name).

1 the spamming continues. Asking an average person whether spamming is "highly
2 offensive" would certainly elicit a positive response.

3 d) Plaintiff is entitled to Damages, for the following reasons:

4 i) Plaintiff is entitled to two types of damages: Statutory (A.R.S. § 44-1372.02) and
5 common law. On the matter of common law damages, Plaintiff has been damaged in
6 two ways: First, by Defendants' unsolicited e-mail occupying Plaintiff's computer
7 memory; and, Second, by deceiving Plaintiff into opening the e-mail, reviewing and
8 studying the e-mail to ensure that it does not relate to Plaintiff's important clients,
9 causing Plaintiff to refocus from current commercial operations to wasteful loss of
10 time. While damages may be difficult to ascertain, it is the genius of the common
11 law that difficult damage questions are left to juries. See *Meyer v. Ricklick*, 99 Ariz.
12 355, 357-58, 409 P.2d 280, 281-82 (1965) (damage amount is peculiarly within jury's
13 province, and the "law does not fix precise rules for the measure of damages but
14 leaves their assessment to a jury's good sense and unbiased judgment"). . . . *Walker v.*
15 *Mart*, 164 Ariz. 37, 41, 790 P.2d 735, 739 (1990); *Logerquist v. McVey*, 196 Ariz.
16 470, 491, 1 P.3d 113, 134 (2000)

17 10) In Paragraph 4 of his Affidavit, Mr. Gosdis states that I told him during a conference with
18 him, "why don't we do this, why don't you just pay me off?". Mr. Gosdis' memory is
19 faulty. I never said this to him.

20 11) I conducted all my pre-filing due diligence carefully and in good faith.

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1 Peter Strojnik
2 Declarant
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